No. 18-125

In The
Supreme Court of the United States

MIRIAM GRUSSGOTT,

Petitioner,

v.

MILWAUKEE JEWISH DAY SCHOOL, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT MILWAUKEE JEWISH DAY SCHOOL, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a private religious school be run by an ordained minister, or "hierarchy of ministers," in order to qualify as a religious organization for purposes of applying the ministerial exception as set forth by this Court in *Hosanna-Tabor Evan. Luth. Church and School v. EEOC*, 565 U.S. 171 (2012)?

2. Does the ministerial exception apply to a Hebrew teacher at a private Jewish day school under *Hosanna-Tabor*, where the school sincerely believes that teaching Hebrew to its Jewish students is an important religious function, and where the teacher integrates Judaic prayers, rituals, concepts, and practices into her teaching?

3. Does a religious organization waive the ministerial exception as an affirmative defense by having a general equal employment opportunity policy?

CORPORATE DISCLOSURE STATEMENT

Respondent Milwaukee Jewish Day School, Inc. ("the Day School") is a non-governmental corporation, which is not publicly traded. The Day School does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. The Day School is a Wisconsin non-stock corporation that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code.

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STATEMENT OF THE CASE

Milwaukee Jewish Day School (the "Day School" or "MJDS") is a private religious school, which offers a Judaic-centric educational program to Jewish schoolchildren from kindergarten through eighth grade. (R-App. 48, ¶ 2.)[1] The Day School was founded in 1981 by community rabbis who wanted to provide a Jewish educational opportunity to families who affiliate with the non-Orthodox (Reform, Conservative, and Reconstructionist) denominations of Judaism. (Id.) The school's stated mission and philosophy are as follows:

> Where academic excellence and Jewish values prepare children for a lifetime of success, leadership and engagement with the world.
>
> * * *
>
> MJDS is committed to providing academic excellence and to educating Jewish children in the values and traditions of our Jewish heritage. A primary goal of our school is to prepare our students to successfully confront the rigors of daily life, while developing commitment to the Jewish community and the community-at-large.
>
> MJDS strives to create an atmosphere that is respectful of all expressions of Judaism, to

[1] Citations to materials from Respondent's Appendix filed with the Seventh Circuit are referenced herein as "R-App. ___." Citations to materials from Petitioner's Appendix filed with this Court in support of her Petition for Writ of Certiorari are referenced as "P-App. ___." Citations to Petitioner's Petition for Writ of Certiorari to this Court are referenced as "Petition __."

> promote the acceptance of individual and collective responsibility and to develop within each student a positive Jewish identity.

(R-App. 58.)

The Day School puts its Jewish educational mission into practice on a daily basis. Students learn about, and participate in, ritual Jewish prayer every day. (R-App. 49, ¶ 5.) The school employs a rabbi, has its own chapel and Torah scrolls, and the walls are blanketed with Hebrew language and other Judaic symbols. (Id.) Students observe the Jewish Sabbath every Friday in school, and learn about and celebrate important Jewish holidays in their individual classrooms and as a collective school community. (Id.) The dietary laws of "*Kashrut*" (Kosher) are "observed during the school day and at all MJDS-sponsored functions." (R-App. 103.) "*Kippot*" (religious head coverings) are worn by male students "during meals, snacks, *tefillah* (prayer), and Hebrew and Jewish studies classes." (R-App. 104.)

In 2013, the Day School hired Miriam Grussgott to teach Hebrew and Jewish studies to elementary-age students. (R-App. 20, ¶¶ 9-10.) Among other duties, Grussgott taught and practiced Jewish prayers with her students in the classroom; accompanied her students to community prayer sessions; taught from the Torah; incorporated Jewish symbolism and holiday traditions into her lessons; taught "Parashat Hashavuah" (the weekly Torah portion) in class; and used the "Tal Am" program, which integrates Hebrew

and Jewish faith studies in a manner "designed to 'develop Jewish knowledge and identity in [its] learners.'" (R-App. 50-51, 108-116, 150-157; P-App. 11a.) Grussgott herself admitted that her role at the Day School involved "teaching Judaism/practicing [the] Jewish Religion," which she agreed "was connected to MJDS' Jewish mission." (R-App. 154-155.)

In March 2015, Grussgott was involved in a verbal altercation with a parent of one of her students. (R-App. 22-23, ¶¶ 17-25.) Grussgott perceived a statement the parent made during the altercation as an insult related to an alleged disability she had suffered from a surgery she had undergone the year before. (Id.) The incident culminated in Grussgott sending (or allowing her husband to send) the parent a threatening email from her work email account. (Id.) After Grussgott met with administrators and admitted to threatening the parent, the Day School terminated her employment. (Id.)

Despite the fact that Grussgott's termination had absolutely nothing to do with any purported disability, and had everything to do with her grossly mishandling an incident with a parent and acting in an extremely unprofessional manner, Grussgott sued the Day School in the United States District Court for the Eastern District of Wisconsin, claiming that her termination was "discriminatory" and violated the Americans with Disabilities Act. (P-App. 15a-18a.) Applying the analysis set forth by this Court in *Hosanna-Tabor*, the district court found that Grussgott's claim was barred as a matter of law by the ministerial exception and granted

summary judgment in the Day School's favor. (P-App. 18a-32a.) The district court held that the undisputed record established that the Day School is a Jewish organization entitled to First Amendment protection, and that Grussgott was a ministerial employee because her job was connected to the school's mission of teaching and promoting Judaism. (Id.)

Reviewing the district court's decision *de novo*, the United States Court of Appeals for the Seventh Circuit affirmed in a unanimous *per curiam* opinion. (P-App. 1a-14a.) The Seventh Circuit held that "the school is a religious institution entitled to assert protection under the ministerial exception" and that "even taking Grussgott's version of the facts as true, she falls under the ministerial exception as a matter of law. Her integral role in teaching her students about Judaism and the school's motivation in hiring her, in particular, demonstrate her role furthered the school's religious mission." (P-App. 5a.)

Grussgott now petitions this Court for writ of certiorari, arguing that the Seventh Circuit erred in affirming summary judgment in the Day School's favor, and that the ministerial exception should not apply to her.

SUMMARY OF THE ARGUMENT

For decades, the Courts of Appeals uniformly recognized the existence of a "ministerial exception" grounded in the First Amendment, precluding the

government from interfering in employment decisions by religious institutions regarding their ministerial employees. *Hosanna-Tabor*, 565 U.S. at 188 (collecting cases). In 2012, this Court unanimously ratified the Courts of Appeals' decisions, confirming that the "Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.* at 184. In balancing "[t]he interest of society in the enforcement of employment discrimination statutes" with "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission," this Court held that "the First Amendment has struck the balance for us." *Id.* at 196. A religious organization "must be free to choose those who will guide it on its way." *Id.*

The Day School's decision to terminate Grussgott falls squarely within the ministerial exception. In furtherance of the school's mission to promote Judaism, Grussgott admitted that she taught and led "prayer sessions" in order to "prepare students to pray properly and primarily in their homes and synagogues." (R-App. 156.) She also admitted that she taught directly from the Torah, attended prayer services in the school's chapel, incorporated Jewish symbolism and ideology into her lessons, participated in observing and celebrating the Jewish Sabbath in school every Friday, and taught Hebrew through an integrated curriculum focused on Judaism and Jewish culture. (R-App. 150-157.) As the Seventh Circuit correctly observed,

"Grussgott's own admissions about her job are enough to establish the ministerial exception as a matter of law." (P-App. 14a.)

In her petition, Grussgott fails to assert any compelling reason why this Court should grant certiorari. She does not identify any decision by a Court of Appeals or state court of last resort applying the ministerial exception in a manner that conflicts with this Court's decision in *Hosanna-Tabor*, or with the decision of any other Court of Appeals or state court of last resort. See U.S. Sup. Ct. R. 10(a)-(b). She also does not identify any important question of federal law that has not been, but should be, settled by this Court. See U.S. Sup. Ct. R. 10(c). Instead, Grussgott asks this Court to correct purported "errors" that she believes the Seventh Circuit made in affirming summary judgment against her. This Court does not function in an error-correcting capacity, but even if it did, Grussgott's petition would have to be rejected because it fails to identify any errors. To the contrary, accepting her arguments would *create* errors – undermining both the ministerial exception's protection of the Day School's First Amendment rights and the exception's structural limitations that safeguard the relationship between Church and State.

Grussgott first argues that the Day School should not be considered a religious organization protected by the ministerial exception because, at the time of her termination, the school was not run by an ordained minister or by any "hierarchy of such ministers." (Petition 7-15.) Setting aside many factual inaccuracies

that Grussgott asserts, accepting an "ordination test" on internal religious structure would impermissibly entangle courts in policing religious beliefs. It would also exclude from the First Amendment's protection entire religious denominations, which either do not have, or theologically reject, the concept of ordination. Courts have universally rejected Grussgott's approach. The critical inquiry is not the purported adequacy of religious training or ordination of those in charge. Rather, the correct inquiry is whether an organization's mission is clearly marked by religious characteristics. There is no question the Day School qualifies.

Grussgott next argues that she should not be considered a ministerial employee because she claims to have taught Hebrew and Judaism only from a "cultural" (as opposed to "religious") perspective, and to the extent she performed a number of religious tasks in her job, she did so "voluntarily." (Petition 15-18.) Again, this argument is replete with factual inaccuracies that are directly contradicted by the undisputed record. But, as the lower court correctly found, the appropriate question is not whether *Grussgott* perceived her functions to be religious, but whether *the Day School* viewed them in that manner. And it is undisputed that the Day School sincerely (and rightly) believed that teaching Hebrew to Jewish children was a religious function performed in furtherance of the school's Jewish mission. Beyond that, in the scope of her job as a Hebrew teacher, Grussgott absolutely was expected to adhere to, and promote, the school's Jewish mission, which she did in a number of ways. The Seventh

Circuit properly held that the ministerial exception, as defined by this Court in *Hosanna-Tabor*, applies to Grussgott.

Finally, Grussgott argues that the Day School waived its right to assert the ministerial exception as an affirmative defense because its 52-page policy manual contains a statement that it will not discriminate in its employment practices. (Petition 18-21.) The idea that the ministerial exception's personal and structural protections could be so easily waived has been consistently rejected by the Courts of Appeals for years, including by courts since *Hosanna-Tabor*, which have relied on this Court's reasoning in that case in support of rejecting this exact argument. Grussgott, on the other hand, does not cite *a single case*, nor is the Day School aware of one, where any court has held that a religious institution waived its Constitutionally-guaranteed right to protection pursuant to the ministerial exception by stating that it is an equal opportunity employer. Allowing such an argument would invite inquiries by courts into all types of conduct by religious organizations that might be used by an aggrieved former employee otherwise barred by the ministerial exception to claim the defense was "waived" because an organization allegedly acted in a way that was contrary to its own religious doctrine. That is precisely the type of inquiry the ministerial exception is designed to prevent.

There is nothing particularly unique about this case or these facts that require this Court's attention. There is no novel federal question that needs to be

answered. There are no clearly conflicting decisions between Courts of Appeals that need to be resolved. *Hosanna-Tabor* and its progeny govern the issues and they were appropriately considered and applied by both the district court and the Seventh Circuit. Grussgott's petition should be denied.

ARGUMENT

I. THE DAY SCHOOL IS A RELIGIOUS ORGANIZATION ENTITLED TO PROTECTION UNDER THE MINISTERIAL EXCEPTION.

At the district court level, Grussgott argued that the Day School was not "Jewish enough" to qualify as a religious institution for purposes of the ministerial exception – an argument the district court swiftly rejected and called "meritless." (P-App. 22a.) On appeal, Grussgott raised the same argument, contending that "the school is not a religious institution because it does not adhere to Orthodox principles," "employs a rabbi only in an advisory (rather than supervisory) capacity," and is not run by "ordained clergy" at the head of an "ecclesiastical hierarchy." (P-App. 5a.) Like the district court, the Seventh Circuit rejected these arguments, holding that "the school's decision to cater toward Conservative, Reform, and Reconstructionist Jewish families, as opposed to Orthodox ones, does not deprive it of its religious character." (Id.)

In her petition, Grussgott focuses on the fact that the Day School is not run by an ordained minister or

hierarchy of ministers. (Petition 7-15.) The Seventh Circuit specifically addressed this point:

> Nor is there any requirement, as Grussgott seems to think, that a religious institution employ "ordained clergy" at the head of an "ecclesiastical hierarchy." Such a constraint would impermissibly favor religions that have formal ordination processes over those that do not.

(P-App. 5a-6a) (citing *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring); *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.")).

Under the Free Exercise and Establishment Clauses, government officials – judicial, legislative, or executive – may not interfere with "matters of church government." *Hosanna-Tabor*, 565 U.S. at 186 (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). It has accordingly long been recognized that the First Amendment "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116 (citing *Watson v. Jones*, 80 U.S. 679, 728-29 (1871)); *accord Hosanna-Tabor*, 565 U.S. at 186 (same).

Unlike Grussgott's proposed ordination analysis, the test the Courts of Appeals uniformly use for determining religious organization status avoids the internal interference problem this Court has taken great care to guard against. "[I]n order to invoke the [ministerial] exception, an employer need not be a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious organization." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015) (quoting *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007), *abrogated on other grounds*). Rather, the key inquiry is whether the organization's "mission is marked by clear or obvious religious characteristics." *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004); *accord Conlon*, 777 F.3d at 834 ("[T]he ministerial exception's applicability does not turn on its being tied to a specific denominational faith; it applies to multidenominational and nondenominational religious organizations as well."); see also *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991) (considering the institution's "substantial religious character").

This approach is consistent with *Hosanna-Tabor* where, in a concurring opinion, Justice Alito, joined by Justice Kagan, addressed why requiring the type of formal ordination Grussgott argues for here would be inconsistent with the religious autonomy the First Amendment seeks to protect:

> The term "minister" is commonly used by many Protestant denominations to refer to

> members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists. In addition, the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions. ***Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term "minister" or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one.***

Hosanna-Tabor, 565 U.S. at 198 (Alito, J., concurring) (emphasis added).

Ordination is clearly *not* the controlling factor for purposes of analyzing whether someone qualifies as a "minister." It should likewise not be the controlling factor for determining whether an organization qualifies as a "ministry" for the same purpose. The Courts of Appeals have uniformly applied that reasoning, both before and after *Hosanna-Tabor*. See, e.g., *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017) (applying ministerial exception to Catholic elementary school run by a "lay principal"); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 229 (3d Cir. 2007) (holding that a community center had a religious mission and qualified as a religious organization even though it "engage[d] in secular activities" and did not "adhere absolutely to the strictest tenets" of its faith); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772

F.2d 1164, 1169 (4th Cir. 1985) (holding that allowing "governmental standards" to control church affairs "would significantly, and perniciously, rearrange the relationship between church and state").

Religious schools in particular have been consistently recognized as quintessential examples of religious organizations that qualify for the ministerial exception, regardless of who sits in the principal's seat, because their "very existence" is dedicated to passing on their religious values "to the next generation." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). It is in that same spirit in which this Court has long acknowledged the "critical and unique role of the teacher in fulfilling the mission of a [religious] school." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979); see also *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 804 (4th Cir. 2000) (applying the ministerial exception to a music director at a Catholic elementary school).

It is true that the head of the Day School at the time Grussgott was employed was not an ordained rabbi. But that fact does not exclude the Day School from the ministerial exception's purview, and the undisputed record clearly establishes that the school's "mission is marked by clear or obvious religious characteristics." *Shaliehsabou*, 363 F.3d at 310. For starters, the school's policy manual – which Grussgott repeatedly references in her petition – sets forth the school's "Philosophy":

> MJDS is committed to providing academic excellence and to educating **Jewish children** in the values and traditions of **our Jewish heritage**. A primary goal of our school is to prepare our students to successfully confront the rigors of daily life, while developing **commitment to the Jewish community** and the community-at-large.
>
> MJDS strives to create an atmosphere that is respectful of **all expressions of Judaism**, to promote the acceptance of individual and collective responsibility and to **develop within each student a positive Jewish identity**.

(R-App. 58.) (Emphasis added.)

Further, despite Grussgott's contention to the contrary, the manual also includes the following mission statement:

> Milwaukee Jewish Day School is an independent, co-educational school for **Jewish children** from junior kindergarten through eighth grade. MJDS respects and embraces the diverse expressions of **Jewish life**.
>
> Our mission statement reads: **Where academic excellence and Jewish values** prepare children for a lifetime of success, leadership and engagement with the world.

(Id.) (Emphasis added.)

In support of her argument that the Day School is like any other "secular school," Grussgott falsely states that the school's policy manual "does not mention

Judaism at all." (Petition 14-15.) That is demonstrably untrue, as the above excerpts show. In addition to the mission and philosophy statements, which use the words "Jewish" and "Judaism" *nine times* in four paragraphs, the manual also includes an entire section devoted to the school's "Jewish Life." (R-App. 58, 102-105.) The "Jewish Life" portion of the manual outlines staff expectations as to the Day School's policies and participation in various Jewish customs and traditions observed at the school. (Id. at 102-106.)

For example, there is a section in the manual addressing the dietary laws of "*Kashrut*" (Kosher), which provides that "*Kashrut* is observed during the school day and at all MJDS-sponsored functions" because it represents "an important means of sanctifying the act of eating" and "infuses the everyday with religious/ethical significance, raising eating from a biological to a religious function." (Id. at 103.) There is also a section explaining how the school observes the Jewish tradition of wearing "*Kippot*," where male students cover their heads with a *kippah*, to "demonstrate[] their respect for God." (Id. at 104.) The school's policy is that "*kippot* be worn by our male students during meals, snacks, *tefillah* (prayer), and Hebrew and Jewish studies classes," including the ones Grussgott taught. (Id.)

The policy manual also includes a separate section on Shabbat and other Jewish holidays, explaining that "[t]he school teaches the sanctity of Shabbat and its place in Jewish tradition" and the "school calendar is closely tied to the Jewish calendar. All *chagim* (holidays) and special commemorations are noted and

observed in the school setting." (Id.) It is also specifically noted that "MJDS does **not** celebrate Valentine's Day, St. Patrick's Day, Easter, Halloween, or other Christian based holidays in any way." (Id. at 105.)

The manual includes a section on "*Tefillah*" (prayer), which states: "Egalitarian prayer services are held daily at every grade level. Lunch and snacks are accompanied by appropriate *b'rachot* (blessings). All students participate in these activities. . . ." (Id.) There is also a section dedicated to "*Tzedakah*" (charitable giving), which states as follows:

> *Tzedakah* (righteousness) and *gemilut chasadim* (acts of loving-kindness) are core values at MJDS that are taught and modeled throughout the school. Students are encouraged to bring coins to donate to *tzedakah* during each Friday's Jewish Studies class and/or Shabbat sing. Each classroom may choose to raise funds toward a specific *tzedakah* project. At times during the year, the entire school may become involved in special projects that benefit others in our community, in our country, in Israel, or in other countries around the world.

(Id.)

Finally, the manual includes a "Hebrew/English Glossary," because school staff and students "frequently use Hebrew words in [their] daily routine." (Id.) The glossary includes, among other Hebrew terms commonly used at the school, all of the following: "*Adon*" – the term used to address male staff; "*Beit*

Midrash" – house of study/worship or chapel; "*Birkat HaMazon*" – blessing after meals; "*Chadar Ochel*" – dining room; "*Chag Sameach*" – happy holidays; "*Chaverim*" – friends; "*Chugim*" – recess; "*Geveret*" – the term used to address female staff; "*Hadracha*" – middle school guidance program; "*Hafsakah*" – middle school break; "*Kabbalat Shabbat*" – service to welcome the Sabbath; "*Mitzvah*" – commandment or responsibility to do good in the world; "*Motzi*" – blessing over meal; "*Omanut*" – creative arts electives; "*Siddur*" – prayer book; and "*Yom Hashishi*" – the sixth day, Friday, the Jewish Sabbath. (Id. at 105-106.)

If an outside observer never learned a single fact about the Day School outside of its policy manual (which Grussgott uses zealously to try to make her argument), it would be obvious that this is not just a "secular school." But the following additional undisputed facts from the record further demonstrate the genuineness of the school's Jewish mission:

- The school was founded in 1981 by community rabbis who wanted to provide a Jewish educational opportunity to families who affiliate with the non-Orthodox denominations of Judaism.
- All of the school's students are Jewish.
- The school promotes Judaism and markets itself as a place to "strengthen children's connections to Jewish life."
- Students participate in ritual Jewish prayer in school.

- The school employs a rabbi.
- The school has its own chapel and Torah scrolls.
- The school is decorated with Judaic and Hebrew symbols.
- Students learn about Jewish holidays in the classroom.
- The school is closed for all major Jewish holidays.
- The school observes Kosher dietary laws.
- Male students wear *kippot* in school.
- Students refer to their teachers by the Hebrew titles "*Adon*" (for male teachers) and "*Geveret*" (for female teachers).
- The school receives significant funding from the Milwaukee Jewish Federation, an organization that raises money for, and promotes, Jewish institutions in the community.
- The school has a family Jewish experience for every grade level.
- The Sabbath is recognized in school, including every Friday morning, when younger students and staff, together with many parents, celebrate the coming Sabbath with a "Shabbat Sing," where students sing Jewish songs in Hebrew.

(R-App. 48-53, 102-106; 151-154.)

The Day School's mission – to provide a Judaic-centric education to non-Orthodox Jewish schoolchildren in the Milwaukee area – is unquestionably marked by religious characteristics. Against this record, it is easy to see why the district court called Grussgott's argument to the contrary "meritless," and why the Seventh Circuit summarily disposed of it. (P-App. 5a-6a.) The Day School's very existence is dedicated to teaching, promoting, and passing on Jewish religious customs, traditions, and values "to the next generation." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring).

If Grussgott's argument for requiring formal ordained leadership was accepted, it would impose an effective religious litmus test, depriving the Day School of the right to determine the contours of its own faith and penalizing the school for its beliefs and its unique Jewish mission. It would also put the government (including the courts) in the position of favoring certain religious schools that are more Orthodox, which would be completely inconsistent with the purpose of the ministerial exception, which is to allow every religious organization "to shape its own faith and mission," and would allow the government to impermissibly interfere with, and entangle itself in, the internal governance of a religious organization. *Id.* at 188.

There is no need for this Court to review the finding by the Seventh Circuit that the Day School is a religious organization for purposes of applying the ministerial exception. The law, which is being interpreted and applied consistently by courts around the

country, was applied appropriately to reach the correct result here. The petition should not be granted for this purpose.

II. GRUSSGOTT WAS A MINISTERIAL EMPLOYEE AT THE DAY SCHOOL.

Grussgott next argues that this Court should grant her petition because the Seventh Circuit purportedly erred in affirming the district court's finding that she was a ministerial employee. (Petition 15-18.) Grussgott does not argue that the Seventh Circuit failed to apply the proper analysis from *Hosanna-Tabor*. Nor does she contend that there is a well-defined split among the Courts of Appeals in applying *Hosanna-Tabor*, and that this Court must clarify the test. Rather, Grussgott argues that the Seventh Circuit simply got its decision wrong and that this Court should correct the alleged "error." (Id.)

Even if this Court functioned to correct errors, which it does not, Grussgott's argument that she was not a ministerial employee because she only taught Hebrew from a "cultural" perspective, and allegedly performed all of her religious functions "voluntarily," fails for at least two reasons. First, the record demonstrates that Grussgott was clearly tasked with performing important religious functions at the school. Those tasks were no more "voluntary" than showing up on time for the start of school each day – something which may not necessarily be "written down" in a "contract" but is clearly an expectation of employment. As

the Seventh Circuit explained, "whether Grussgott had discretion in planning her lessons is irrelevant; it is sufficient that the school clearly intended for her role to be connected to the school's Jewish mission." (P-App. 11a.)

Second, even if the Court accepted the false premise offered by Grussgott that she chose to perform all of her religious tasks "voluntarily," teaching Hebrew at the Day School – *in and of itself* – is an important religious function, which cannot be subject to government (or court) interference. The ministerial exception gives religious employers the freedom to make employment decisions to shape the practice of their faith. Thus, even if Grussgott truly did not believe her job was connected to the school's Jewish mission (though the record indicates the opposite), it is the *school's* expectation (not Grussgott's) regarding the function of its Hebrew teachers that matters. The Day School's genuine belief that its Hebrew teachers perform important religious functions is undisputed.

In the lower courts, Grussgott primarily argued that she should not be considered a ministerial employee because she was not ordained or trained as a rabbi. That argument was correctly rejected by both the district court and the Seventh Circuit, as this Court and "[e]very Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation." *Hosanna-Tabor*, 565 U.S. at 190. Grussgott abandoned that argument here, focusing instead on her claim that she was not "tasked" with performing

any religious function, which she contends is evidenced by the fact that no written "employment contract" specifically sets forth the religious duties she was to perform. (Petition 16-17.) But the record is replete with undisputed evidence – including admissions by Grussgott – of the important religious functions she performed in "conveying the [school's Jewish] message and carrying out its mission," and "transmitting the [Jewish] faith to the next generation." *Hosana-Tabor*, 565 U.S. at 192.

The Seventh Circuit rightly found based on the undisputed record that, in her job as a Hebrew teacher, Grussgott was expected to teach the Jewish faith and promote the school's mission of instilling Jewish values and developing Jewish identities in students:

> Hebrew teachers at Milwaukee Jewish Day School were expected to follow the unified Tal Am curriculum, meaning that the school expected its Hebrew teachers to integrate religious teachings into their lessons.
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> * * *
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> Grussgott undisputedly taught her students about Jewish holidays, prayer, and the weekly Torah readings; moreover, she practiced the religion alongside her students by praying with them and performing certain rituals, for example. Grussgott draws the distinction between leading prayer, as opposed to "teaching" and "practicing" prayer with her students. She also challenges the notion that the "Jewish concept of life" taught at Milwaukee Jewish Day School is religious, claiming this too is

> predominately taught in a historical manner. But Grussgott's opinion does not dictate what activities the school may genuinely consider to be religious. . . . For example, some might believe that learning the history behind Jewish holidays is an important *part* of the religion. Grussgott's belief that she approached her teaching from a "cultural" rather than a religious perspective does not cancel out the specifically religious duties she fulfilled.
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> * * *
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> The school intended Grussgott to take on a religious role, and in fact her job entailed many functions that simply would not be part of a secular teacher's job at a secular institution. . . . [I]t is the school's expectation – that Grussgott would convey religious teachings to her students – that matters.

(P-App. 9a-12a.)

Grussgott's argument is further belied by her own admissions that she "believe[d] that her job at MJDS was connected to MJDS' Jewish mission," that her job included "teaching Judaism/practicing [the] Jewish Religion," and that she modeled and taught Jewish prayers in school in order to "prepare students to pray properly . . . in their homes and synagogues." (R-App. 150-157.) Grussgott clearly understood her role in transmitting the Jewish faith to the next generation, and, as the Seventh Circuit held, "[e]ven if we disregarded the school's version of the facts altogether, Grussgott's own admissions about her job are enough

to establish the ministerial exception as a matter of law." (P-App. 14a.)

It is undisputed that the Day School sincerely believes that the Hebrew language is closely connected to Judaism, and that teaching the language to Jewish schoolchildren in their care is important to its Jewish mission. (R-App. 52-53.) That is why, for example, in Hebrew classes like Grussgott's, male students are expected to cover their heads with *kippot* to "demonstrate[] [their] respect for God" while studying the sacred language of Judaism, but are not expected to do the same during secular classes like math. (R-App. 104.) Whatever Grussgott may think about the religiousness of teaching Hebrew at the Day School is irrelevant. Neither she, nor the courts, can second-guess the school's sincere religious beliefs and practices. *Hosanna-Tabor*, 565 U.S. at 185-86 (internal "matters of . . . faith and doctrine" must be "free from state interference").

The Courts of Appeals have consistently applied this Court's precedent requiring the government to restrain itself from entanglement issues like the one Grussgott presses here regarding the Day School's view of the religious significance of teaching Hebrew. See *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 179-80 (5th Cir. 2012) (courts cannot "second-guess" sincere religious beliefs); *McCarthy v. Fuller*, 714 F.3d 971, 980 (7th Cir. 2013) ("federal courts are not empowered to decide (or to allow juries to decide)

religious questions"); *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 452 (7th Cir. 2013) (it is not within the judicial "province to evaluate whether particular religious practices or observances are necessarily orthodox or even mandated by an organized religious hierarchy"); *Korte v. Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013) ("secular judges must defer to ecclesiastical authorities on questions properly within their domain").

In *Schleicher v. Salvation Army*, 518 F.3d 472, 477 (7th Cir. 2008), for example, the Seventh Circuit refused to declare that the work of wine-making monks was "secular," granting deference to the religious organization and explaining "to entertain such arguments would plunge a court deep into religious controversy and church management." See also *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir. 2006), *abrogated on other grounds by Hosanna-Tabor*, 565 U.S. at 171 (applying the ministerial exception to a church music director, and refusing to accept plaintiff's argument that "music has in itself no religious significance").

Similarly, in *Shaliehsabou*, the Fourth Circuit held that the ministerial exception precluded discrimination claims of a former staff member of a Jewish nursing home who was in charge of inspecting food deliveries. The plaintiff there argued that the exception should not apply "because his primary duties involved nothing more than inspecting incoming food deliveries and ensuring the kosher preparation of food." 363 F.3d at 308. The Fourth Circuit rejected that argument, and held that failing to "apply the ministerial exception in

this case would denigrate the importance of keeping kosher" in the Jewish religion. *Id.* at 308-09; see also, *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d 433, 442-43 (Mass. 2012) (applying *Hosanna-Tabor* and concluding that the ministerial exception barred a teacher's age discrimination suit where her "teaching duties included teaching the Hebrew language, selected prayers, stories from the Torah, and the religious significance of various Jewish holidays"; where "she was not a rabbi, was not called a rabbi, and did not hold herself out as a rabbi"; and where "[t]he record [was] silent as to the extent of her religious training").

Failing to apply the ministerial exception in this case would denigrate the importance of teaching Hebrew to the next generation of young Jewish schoolchildren. There is no way to permit Grussgott's requested inquiry into "*how religious*" teaching Hebrew at the Day School is without entangling federal courts in internal religious beliefs. The First Amendment's protection of religious autonomy is "plainly jeopardized when . . . litigation is made turn on the resolution by civil courts of controversies over religious doctrine and practice." *Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich*, 426 U.S. 696, 710 (1976). Where, as here, such a request would require courts to "inquire into the significance of words and practices to different religious faiths, and . . . by the same faith," it would "inevitably [] entangle the State with religion in a manner forbidden by" long-established Constitutional precedent. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981).

As Justices Alito and Kagan warned in *Hosanna-Tabor*, "the mere adjudication of such questions would pose grave problems for religious autonomy" by requiring "calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." 565 U.S. at 205-06 (Alito, J., concurring); see also, *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring) ("What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident."). It is plainly inappropriate for the government to become involved in challenging a religious institution's honest assertion that a particular practice is a tenet of faith.

There is no well-defined conflict among the Courts of Appeals that needs to be resolved on this issue. Grussgott has asked the courts to judge how the Day School practices and teaches Judaism by questioning whether the school may appropriately hold the teaching of the Hebrew language out as a sacred, religious practice, and not merely as the teaching of a foreign language with no connection to Judaism. That is precisely the type of religious decision, practice, and judgment that the First Amendment prohibits courts from becoming involved in. That is what both the district court and Seventh Circuit properly held, and that is another reason why this Court should deny Grussgott's petition.

III. THE DAY SCHOOL CANNOT AND DID NOT WAIVE ITS RIGHT TO RELY ON THE MINISTERIAL EXCEPTION AS AN AFFIRMATIVE DEFENSE BY HOLDING ITSELF OUT AS AN EQUAL OPPORTUNITY EMPLOYER.

Grussgott's final argument is that the Day School waived its right to assert the ministerial exception as an affirmative defense because its employee policy manual contains a general statement that it will not discriminate in its employment practices. (Petition 18-21.) The Seventh Circuit rejected this argument, and its decision aligns with all of the other lower courts that have addressed the issue. There is no conflict among courts that an institution does not waive the ministerial exception merely by representing that it is an equal opportunity employer – a position that courts uniformly agree is supported by *Hosanna-Tabor*.

The anti-discrimination language from the school's policy manual that Grussgott relies on states as follows:

> MJDS, in its employment and personnel policies and practices, will not discriminate against any individual because of race, creed, religion, color, sex, age, handicap, national origin, ancestry, veteran status or sexual orientation. . . .

(R-App. 61-62.)

Grussgott asserts two separate waiver arguments based on this language. First, she argues that because

the statement includes the word "religion," the school has waived its right to claim that it is a "religious institution" under the ministerial exception. (Petition 20.) Second, Grussgott argues that because the statement includes the word "handicap," the school has waived its right to assert an affirmative defense based on the ministerial exception altogether. (Id. at 20-21.) Neither of these arguments has any merit.

In this case, the Seventh Circuit relied on one of its prior decisions, holding that there "is no requirement that an organization exclude members of other faiths in order to be deemed religious," and that "a religious institution does not waive the ministerial exception by representing itself to be an equal-opportunity employer." (P-App. 6a) (citing *Tomic*, 442 F.3d at 1042). In *Tomic*, an age discrimination plaintiff argued that a religious institution should be estopped from asserting the ministerial exception defense because its employee handbook contained a provision describing the institution as "an Equal Opportunity Employer" that does not discriminate on the basis of a variety of characteristics, including age. 442 F.3d at 1039, 1041-42. The court rejected that argument, holding that "the ministerial exception, like the rest of the internal-affairs doctrine, is not subject to waiver or estoppel" and that a "federal court will not allow itself to get dragged into a religious controversy even if a religious organization wants it dragged in." *Id.* at 1042. As the Seventh Circuit aptly put it here, accepting Grussgott's argument would perversely force courts to "use the school's promotion of inclusion as a weapon to

challenge the sincerity of its religious beliefs." (P-App. 6a.)

The Seventh Circuit's view aligns with other circuits. In *Conlon*, the Sixth Circuit considered a case where a religious institution represented on its website that it was an "equal opportunity employer" that would not discriminate. 777 F.3d at 831. The court rejected the argument that, by making that representation, the religious institution had waived its right to assert the ministerial exception defense, holding that "the Constitution does not permit private parties to waive the First Amendment's ministerial exception." *Id.* at 836.

In reaching its decision, the Sixth Circuit relied heavily on the analysis from *Hosanna-Tabor*:

> Both Religion Clauses *bar* the government from interfering with a religious organization's decisions as to who will serve as ministers. *Hosanna–Tabor*, 132 S. Ct. at 702 (emphasis added). "[T]he Establishment Clause . . . *prohibits* government involvement in ecclesiastical matters." *Id.* at 704 (emphasis added). It is "*impermissible* for the government to contradict a church's determination of who can act as its ministers." *Id.* (emphasis added). This reasoning – along with other precedents the Court cites, *see, e.g.*, *id.* (collecting cases) – does not allow for a situation in which a church could explicitly waive this protection. . . . Nor can such a waiver be reconciled with the Supreme Court's rationale. "Requiring a church to accept or retain an

> unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action ***interferes with the internal governance of the church***." *Id.* at 705 (emphasis added). The Court's clear language recognizes that the Constitution does not permit private parties to waive the First Amendment's ministerial exception. ***This constitutional protection is not only a personal one; it is a structural one that categorically prohibits federal and state governments from becoming involved in religious leadership disputes.***

Conlon, 777 F.3d at 836 (emphasis added).

Similarly, in a very recent case, *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, No. 17-3086, 2018 WL 4212091 (3d Cir., Sept. 5, 2018), the Court of Appeals for the Third Circuit reviewed a decision where the district court, raising the issue *sua sponte*, granted summary judgment and dismissed a claim against a church on the basis of the ministerial exception. As part of its analysis, the Third Circuit noted that the affirmative defense had not been litigated by the parties during the proceedings, but specifically held that the church could not have been "deemed to have waived [the ministerial exception] because the exception is rooted in constitutional limits on judicial authority." *Id.* at *3 n.4.

There is no reason for this Court to review this case in order to make more explicit the clear

implication from *Hosanna-Tabor* that the ministerial exception cannot be waived in the manner that Grussgott argues it was here. The clarity of this rule is demonstrated by the fact that all of the Courts of Appeals that have considered the issue since *Hosanna-Tabor* have ruled uniformly. (P-App. 1a-14a); *Conlon*, 777 F.3d at 836; *Lee*, 2018 WL 4212091, at *3 n.4. By contrast, Grussgott has not cited a single case in which a court held that the ministerial exception was waived on this basis, nor is the Day School aware of one.

Even if it was *possible* to waive the ministerial exception under these circumstances, such a waiver certainly did not occur here. Waiver is the intentional relinquishment of a known right, and when that right is founded in the Constitution, "courts indulge in every reasonable presumption against waiver." *Brewer v. Williams*, 430 U.S. 387, 404 (1977); see also *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2486 (2018) ("[W]aiver [of First Amendment rights] cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." (citations omitted)); *Petruska v. Gannon Univ.*, 462 F.3d 294, 309 (3d Cir. 2006) (courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights").

Here, the only alleged evidence of waiver is a general nondiscrimination statement in a school policy manual. Even prior to *Hosanna-Tabor*, courts consistently held that religious institutions do not waive the ministerial exception defense by making a general

statement about being an equal opportunity employer. For example, in *Petruska*, the Third Circuit held that a religious institution "did not waive its right to raise the ministerial exception" by "representing itself as an 'equal opportunity employer' or by accepting federal and state funds." 462 F.3d at 309. Similarly, in *Hollins*, the Sixth Circuit held that a religious institution did not waive its Constitutional right to be free from judicial interference with the selection of its ministers by obtaining accreditation that required it to adhere to nondiscrimination clauses. 474 F.3d at 226-27.

This case is no different. The nondiscrimination statement in the Day School's policy manual is not "clear and compelling" evidence that the school intended to "relinquish" its right to assert the ministerial exception as a defense.

Courts have uniformly dealt with the waiver argument in the same way the Seventh Circuit handled it here, for precisely the reason that guided this Court's analysis in *Hosanna-Tabor* – respecting the First Amendment values of free exercise and non-entanglement. There is no compelling reason for this Court to reverse course to hold that a religious institution can waive its First Amendment protection pursuant to the ministerial exception by representing itself as an equal opportunity employer. Allowing plaintiffs to make waiver arguments of this nature would impermissibly entangle courts with religious questions – something this Court specifically warned against in *Hosanna-Tabor*, 565 U.S. at 188 (finding that the ministerial exception doctrine not only protects the Constitutional

rights of religious groups, it also serves as a structural safeguard that protects the government from becoming entangled in such "ecclesiastical decisions").

If Grussgott's argument – that by merely promoting inclusion, the Day School loses the protection of the ministerial exception – was allowed, it would mean that plaintiffs could use a religious institution's *own religious teachings* against it to argue that the ministerial exception had been waived, which would be a clear situation of improper entanglement, and precisely the type of religious question that the exception is supposed to protect courts from becoming involved in. See *Jones v. Wolf*, 443 U.S. 595, 602 (1979) ("civil courts [must] defer to the resolution of issues of religious doctrine or policy" by the religious body at issue). The fact that the Day School values acceptance and understanding does not and should not disqualify it from receiving the protections the Constitution expressly guarantees.

This Court's jurisprudence and the uniform holdings of the lower courts protect against the type of improper entanglement Grussgott advocates for here. Those uniform rulings are consistent with all of the precedent regarding the ministerial exception, and with the policy reasons justifying the existence of the exception to begin with. The Court need not take this case to reiterate a rule that is already being enforced consistently and uniformly.

CONCLUSION

The Seventh Circuit did not err in finding that Grussgott's disability discrimination claim against the Day School is barred as a matter of law by the ministerial exception. Grussgott's petition presents no novel federal question. Nor does Grussgott's petition present any issues that raise well-defined splits of authority among the Courts of Appeals. To the contrary, arguments like Grussgott's have been rejected by every Court of Appeals to consider them. The law was properly applied here by both the district court and the Seventh Circuit, and Grussgott's petition should be denied.

Dated this 27th day of September, 2018.

Respectfully submitted,

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